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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Petitioners,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

ERISA creates a cause of action for a pension plan against an employer that withdraws (ceases contributions) from the plan and fails to pay its statutory withdrawal liability. Each member of a group of trades or businesses under common control with the former contributor is jointly and severally liable. For purposes of the statute of limitations under the federal discovery rule, the court below held that a cause of action accrues against *all* such trades or businesses when *one* of them fails to pay its liability when demanded even though other liable trades or businesses are concealed from the pension plan. The questions presented are—

1. Whether for a cause of action under ERISA to accrue on a claim against a trade or business as a result of its failure to pay withdrawal liability, where that trade or business was concealed, a pension plan must have knowledge of the existence of the trade or business?

2. Whether dismissal of a cause of action under Fed. R. Civ. P. 12(b)(6) due to a statute of limitations bar may be affirmed on grounds of lack of diligence where the complaint alleges concealment of the identity of the defendants and plaintiffs are denied an opportunity to present evidence of diligence in support of equitable relief?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 3 F.3d 171 and is set forth in Appendix A. The opinion of the United States District Court for the Northern District of Illinois is unreported, but is set forth in Appendix B. The opinion of the district court on motion to alter or amend is

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[1] The following Central States trustees were parties to the proceeding in the court of appeals and join in this petition: Robert J. Baker, Howard McDougall, Arthur H. Bunte, Jr., R.V. Pulliam, Sr., R. Jerry Cook, and Harold D. Leu. Robert C. Sansone, and Marion M. Winstead, who were plaintiffs below, are no longer Central States trustees.

unreported and is set forth in Appendix C. The order of the court of appeals on petition for rehearing is set forth in Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1993. The order denying a petition for rehearing was entered on September 20, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C. § 1301. Definitions.

> (b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of Section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under Section 414(c) of Title 26.

29 U.S.C. § 1381. Withdrawal liability established; criteria and definitions.

> (a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.
>
> (b) For purposes of subsection (a) of this section—
>
> (1) The withdrawal liability of an employer to a plan is the amount determined under Section

1391 of this title to be the allocable amount of unfunded vested benefits, adjusted—

(A) first, by any de minimis reduction applicable under Section 1389 of this title,

(B) next, in the case of a partial withdrawal, in accordance with Section 1386 of this title,

(C) then, to the extent necessary to reflect the limitation on annual payments under Section 1399(c)(1)(B) of this title, and

(D) finally, in accordance with Section 1405 of this title.

(2) The term "complete withdrawal" means a complete withdrawal described in Section 1383 of this title.

(3) The term "partial withdrawal" means a partial withdrawal described in Section 1385 of this title.

29 U.S.C. § 1399. Notice, collection, etc., of withdrawal liability.

(a) Furnishing of information by employer to plan sponsor.

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete or partial withdrawal by employer.

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

29 U.S.C. § 1451(f). Time limitations.

An action under this section may not be brought after the later of—

(1) six years after the date on which the cause of action arose, or

(2) three years after the earlier date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action.

Fed. R. Civ. P. 12. Defense and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on the Pleadings.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service or process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other de-

fenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion sh ll be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "Pension Fund") is a multiemployer pension plan within the meaning of Sections 3(2), (35), (37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(2), (35), (37) and 1301(a)(3). The trustees of Central States are collectively the "plan sponsor" within the meaning of 29 U.S.C. §§ 1002(16)(B) and 1301 (a)(10).

During the fall of 1983, United States Bedding Company ("U.S. Bedding") and The Englander Company ("Englander") filed petitions for bankruptcy protection. Both organizations had contributed to Central States on behalf of their participating employees. Both withdrew from this plan in January 1984, however, and were assessed withdrawal liability of $672,000.00 pursuant to 29 U.S.C. §§ 1381 and 1399(b)(1).[2] Central States filed claims in their respective bankruptcies.

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[2] This is statutory liability under the Employee Retirement Income Security Act of 1974 ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") 29 U.S.C. §§ 1381-1451. This Court has recently reviewed the withdrawal liability statute in *Concrete Pipe and Products v. Construc-*

Both U.S. Bedding and Englander were part of a group of trades or businesses under common control (a "controlled group") under the umbrella of Van Vorst Industries, Inc. 29 U.S.C. § 1301(b)(1). Petitioners learned that Van Vorst Industries and other corporate controlled group members had no assets and thus the withdrawal liability was uncollectible against them. But a partnership, NAVCO, whose inclusion in the controlled group was first discovered by Petitioners in 1990, apparently (and in conjunction with its partner William Caldwell) had assets. Petitioners' discovery of NAVCO's controlled group relationship frames much of the legal argument this petition presents.

Because other trades or businesses under common control with U.S. Bedding and Englander were closely held corporations, the affiliation of Respondents with these corporations (*i.e.*, the common control) was not publicly disclosed. Accordingly, Petitioners assigned in-house counsel (located in Chicago, Illinois, where the plan is administered) and retained Los Angeles counsel (where the bankruptcy petitions were filed) to investigate beginning in 1984. As part of the investigation, Central States was confronted with over 650 bankruptcy pleadings and consulted several commercial business directories, but uncovered nothing which disclosed NAVCO's controlled group relationship to U.S. Bedding and Englander.

In addition, on November 3, 1983, Petitioners sent to U.S. Bedding and Englander (and, constructively, to all members of their controlled group, including NAVCO) various inquiries. Formatted in a document called "Statement of Business Affairs," these inquiries requested, in part, the disclosure of all trades or businesses under common control with U.S. Bedding, Englander, or both. NAVCO, and all other controlled group members, were

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tion Laborers Pension Trust, —— U.S. ——, 113 S.Ct. 2264 (1993). An overview of the statute is also contained in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709 (1984).

required by statute to truthfully respond to the inquiries in writing within thirty days pursuant to 29 U.S.C. § 1399(a). Neither NAVCO nor any other controlled group member responded. A second Statement of Business Affairs, presenting the same inquiries, was sent on March 14, 1984. Again, no response was returned to Petitioners.[3]

It was not until 1990 that Petitioners discovered NAVCO's existence and its controlled group relationship to U.S. Bedding and Englander. The discovery was made by Petitioners' counsel while updating and evaluating withdrawal liability assessment information as part of an ongoing, periodic review program.

This lawsuit followed on May 1, 1991. Petitioners' complaint alleged that NAVCO and, derivatively, William Caldwell (as general partner of NAVCO) are legally responsible for the withdrawal liability assessed against U.S. Bedding and Englander since NAVCO, U.S. Bedding and Englander are controlled group members. It also alleged that the controlled group relationship was concealed since there were no responses to the 29 U.S.C. § 1399(a) inquiries.

Before the district court, the defendants moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the complaint brought against them by Petitioners was time-barred as measured by 29 U.S.C. § 1451(f), which states:

> An action under this section may not be brought after the later of—
>
> (1) six years after the date on which the cause of action arose, or
>
> (2) three years after the earliest date on which the plaintiff acquired or should have acquired

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[3] *See* district court opinion, Appendix B at 13a-14a (references to the Appendix to this petition will hereafter be abbreviated App. —— at ——).

> actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action.

The district court agreed with the defendants and granted the motion to dismiss. App. B at 17a; 14a. It reasoned that Petitioners' action accrued on June 5, 1984, when the first withdrawal liability payment was not made, and that the complaint was therefore untimely, measured by the six-year period prescribed in 29 U.S.C. § 1451(f)(1). Because it ruled on a motion to dismiss, the district court received no evidence of whether Petitioners "acquired or should have acquired knowledge of the existence of [the] cause of action" and thus did not consider defendants' concealment and whether diligence had been exercised by Petitioners. In the district court's view diligence was irrelevant to the legal ruling made by the court that a single accrual date applied to each member of the controlled group whether known, unknown, or concealed from the Pension Fund. App. C at 22a.

Petitioners timely appealed to the Seventh Circuit. On appeal, the *NAVCO* court affirmed the district court on the grounds that Petitioners' action accrued "even though [Petitioners] did not know that the injury is actionable." App. A at 5a. Accordingly, the court, like the district court, held that Petitioners' action accrued in 1984, and that, measured by 29 U.S.C. § 1451(f)(1), the complaint was untimely. *Id.* at 9a.

Unlike the district court, and in implicit reversal of it, however, the *NAVCO* court considered equitable doctrines.

> Today's case is not an occasion to determine the limits to equitable extensions under ERISA. . . . [Because] NAVCO and Caldwell did not attempt to deceive the pension funds or induce them to defer suing[,] [the doctrine of equitable estoppel is unavailing]. Equitable tolling, the other doctrine, per-

> mits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim. This doctrine is potentially important in controlled group cases, because sometimes even six years will not be long enough to round up every last member.

Id. at 11a-12a (internal quotation marks and citations omitted).

Finding no record of Central States' diligence in seeking to identify Respondents as potentially liable, the court below concluded that Petitioners had not acted with diligence. To reach this conclusion, however, the court necessarily assumed a factfinder's role because there was no record of Petitioners' lack of diligence, due to the district court's disposition under Fed. R. Civ. P. 12(b)(6). The court below simply ignored the fact that Central States had apprised it of this problem. *See e.g.*, Excerpt of Central States brief on appeal, App. E at 28a-31a, and reply brief App. F at 32a. Indeed at oral argument the following exchange took place:

> *Pension Fund Counsel*: The terms "no showing," in effect lack of diligence, keep cropping up. . . . Well these are factual matters that shouldn't have been resolved on a motion to dismiss. If that is in fact the crux of this, then at a minimum a remand is necessary, and we will show that the Fund did, that we did look at Dun & Bradstreet and—
>
> *Judge Easterbrook*: It is your position that you have evidence that you would present on remand?
>
> *Pension Fund Counsel*: Your honor, we would present evidence of searches that went on, off and on, throughout the six years period.

This exchange, in part, prompted Petitioners to file a motion for rehearing and a suggestion for rehearing in banc, arguing that the claim against NAVCO had been

pursued diligently and that they had been deprived of the opportunity to prove it. Attached to the motion was a twelve-page affidavit of Petitioners' counsel, detailing the numerous steps taken by Petitioners and their counsel to identify NAVCO and its controlled group relationship. On September 20, 1993, the *NAVCO* court denied the motion for rehearing in a five-sentence order that summarily recites that the diligence argument had been waived. The record shows, however, that Petitioners' diligence was not only addressed during oral argument, but that the need for development of such a record was briefed.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION AND SUMMARY

Respondent U.S. Bedding contributed to Central States on behalf of its bargaining unit employees pursuant to a collective bargaining agreement. In January 1984 this obligation to contribute ceased and U.S. Bedding withdrew from Central States within the meaning of 29 U.S.C. § 1381. U.S. Bedding thus became liable for withdrawal liability. Central States demanded payment of the liability from U.S. Bedding on April 6, 1984, but it was not paid. A cause of action arose against U.S. Bedding in 1984 upon its non-payment, but U.S. Bedding had previously filed for bankruptcy. Consequently Central States could not sue the company but, rather, filed a claim in the bankruptcy proceeding.

Under ERISA all trades or businesses under common control with a former (withdrawn) contributor (the "controlled group") are jointly and severally liable for the withdrawal liability. *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 11 (1st Cir. 1980). A plan's demand received by one member of the controlled group is deemed notice to all members of their collective and

individual obligations to pay. *Central States Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992); *IUE AFL-CIO Pension Fund v. Barker & Williamson*, 788 F.2d 118 (3rd Cir. 1986). U.S. Bedding belonged to such a controlled group, and no member of that group paid any liability to Central States. As it is permitted to do under 29 U.S.C. § 1399(a), Central States twice inquired of U.S. Bedding (and thereby the common owners of the controlled group) about the identity of all members of the group. U.S. Bedding and its owners had a statutory obligation to respond to this inquiry but they failed to do so.[4] Central States filed claims against certain bankrupt controlled group members. However, more than six years after U.S. Bedding defaulted on its withdrawal liability obligations, Central States' investigation bore fruit, and Central States learned of the existence of other, non-bankrupt controlled group members, *i.e.*, Respondents in this case, NAVCO and William Caldwell.

Central States was injured in fact, and had knowledge of that injury, when U.S. Bedding failed to pay its withdrawal liability. Central States was also injured in fact when Respondents NAVCO and William Caldwell failed to pay the withdrawal liability. Central States, however, did not initially have knowledge that Respondents had caused any injury to it because Central States had no knowledge of their existence as trades or businesses under common control with U.S. Bedding. That knowledge, under the control of Respondents, was withheld from Central States in disregard of an express statutory obligation to respond to Central States' written inquiry. When Central States eventually acquired that knowledge it filed a lawsuit against Respondents at once. The district court

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[4] Section 1399(a) requires the employer to "furnish such information as the plan sponsor reasonably determines to be necessary *to enable the plan sponsor to comply with the requirements of this part.*" (Emphasis added.)

dismissed Central States' action under Fed. R. Civ. P. 12(b)(6) on the grounds that the action was barred under the six year statute of limitations found at 29 U.S.C. § 1451(f)(1).

The United States Court of Appeals for the Seventh Circuit affirmed this district court ruling. The court below relied on *United States v. Kubrick*, 444 U.S. 111 (1979), and held that "a claim accrues under a discovery rule for purposes of a statute of limitations when the victim knows of his injury . . . even though the victim does not know that the injury is actionable." App. A at 5a. Accordingly, the court further held, "the fact that the victim does not know who would be the right defendant cannot matter," and therefore concealment cannot matter. *Id.*

Other circuits, also relying on *Kubrick*, have reached a different conclusion. For example, the Second Circuit has held that where there is concealment the identity of a particular entity may be an essential element of a cause of action and thus knowledge of the identity of that entity may be essential before the cause of action accrues:

> Not only was the "what" element of the causation inquiry arguably unknown to plaintiffs, but the "*who*" element was also missing from the puzzle.

Barrett v. United States, 689 F.2d 324, 330 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983) (holding that lack of knowledge of "who" committed the tort delayed accrual for statute of limitations purposes when concealment was involved). *See also Diminnie v. United States*, 728 F.2d 301 (6th Cir.), *cert. denied*, 469 U.S. 842 (1984).

There is a conflict among the circuits, then, on how *Kubrick* should be applied in determining when a claim accrues under a statute of limitations where the existence of putative defendants is concealed by them, and thus the acts of the defendants giving rise to the injury are un-

known to the plaintiff. The answer to Question 1 of this Petition would resolve this conflict between the circuits.

Further, the interpretation of *Kubrick* taken by the Seventh Circuit in this case is wrong and threatens grave mischief. *Kubrick* simply held that ignorance of plaintiff's *legal rights* does not prevent the accrual of the cause of action. *Kubrick* distinguished such legal ignorance from lack of knowledge of the underlying *facts*. 444 U.S. at 122. In the latter case the court noted that injury in fact may be unknown or unknowable until the injury manifests itself, and the facts about causation may be in the exclusive control of the putative defendant; therefore, lack of knowledge of the underlying facts may delay the accrual of the cause of action for statute of limitations purposes. *Kubrick*, 444 U.S. at 122. Central States was deprived of *factual* knowledge of the common ownership relationship linking Respondents to the withdrawn employer (U.S. Bedding), and therefore was denied knowledge of the *fact* that Respondents had failed to pay their statutory liability. The ruling below strips civil litigants in federal cases of the delayed accrual rule that other circuits believe should apply in the case of a defendant who has concealed his identity or concealed the underlying cause of action. This is particularly anomalous where, as here, Congress specifically directed disclosure. 29 U.S.C. § 1399(a).[5]

This Court should resolve this conflict now. The rights of litigants should not turn on hypertechnical application of rules that are themselves fraught with ambiguity. The fact that the courts of appeals cannot agree on when a cause of action involving concealment is "discovered" under the federal discovery rule puts litigants at risk of *ad hoc* decisionmaking. The federal courts ought to be able to agree about something so fundamental. This prob-

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[5] Moreover the Seventh Circuit rule punishes honest disclosure and rewards successful concealment by rendering liable only those who have disclosed.

lem is, and will continue to be, particularly acute not only in withdrawal liability controlled group cases, but also in all federal cases involving multiple defendants and issues as to when the plaintiff discovered the role of each defendant in the alleged injury. *Dubose v. Kansas City Southern Ry. Co.*, 729 F.2d 1026, 1031 (5th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984). The cumulative, nationwide impact of the uncertainties created by this split in authority amounts to a manifest injustice. This is not an issue that can await further development; without this Court's guidance the federally created rights of unwitting plaintiffs may be defeated by defendants concealing their involvement in an injury. This Court should clarify when a cause of action accrues in the face of concealment of the very existence and identity of the named defendants.

Of course there are exceptions to statutes of limitations in the form of equitable relief—sometimes referred to as equitable "tolling." A classic case for application of equity to overcome a limitations period is where defendants conceal a material fact and thereby the cause of action. Availability of relief generally turns on whether plaintiffs, through diligent inquiry, should have known of the cause of action.

The court below ruled that equitable relief was not available to Central States due to its lack of diligence in pursuing Respondents. The court, however, erroneously believed that the district court had ruled on a motion for summary judgment, App. A at 3a, and therefore believed that the lack of a showing of diligence was dispositive.[6] In fact in the instant case the district court ruled on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and did not permit Central States to make a record of dili-

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[6] The court was confused, perhaps, by a companion case that it had consolidated with the instant case for purposes of decision. *See* App. A at 4a-5a. The other case had been decided on summary judgment, and plaintiffs there had not shown diligence though invited to do so by their district court.

gence. App. B. at 13a. On petition for rehearing Central States pointed out the court's error and that Central States had requested remand for development of such a record in both its brief and at oral argument. Without further explanation (and wholly without basis) the court below ruled that the question had been waived. Question 2 requests that the Court correct this procedural error.

The issues raised by concealment for purposes of the accrual rule are virtually identical to those raised by concealment for purposes of equitable tolling. Indeed the courts of appeals making rulings under *Kubrick* often treat the questions as the same. *See e.g., Diminnie, supra,* 728 F.2d at 305. Had the Seventh Circuit not erred by treating the case as a summary judgment decision, it might under *Kubrick* have reached the right result for a concealment case under the banner of equitable tolling (rather than the banner of delayed accrual). This Court should grant this Petition, reverse the court of appeals on its procedural error, and remand the case for development of a record of Respondents' concealment and Petitioners' diligence in trying to pierce it. It is likely, once that record is made, that the Seventh Circuit would rule differently, thereby removing the conflict in the circuits raised by Question 1.

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS ON WHEN A CAUSE OF ACTION ACCRUES UNDER *KUBRICK*.

A. Accrual Of This Withdrawal Liability Action Requires Knowledge Of The Actionable Controlled Group Relationship.

Relying upon *U.S. v. Kubrick*, 444 U.S. 111 (1979), the Seventh Circuit held that a cause of action accrues for purposes of a statute of limitations even though the identity of the defendants is concealed from plaintiffs. *Kubrick*, however, is not so broad. Other courts rely-

ing on *Kubrick* have properly held that the defendants' *concealment* delays the accrual of a cause of action. *Barrett v. United States*, 689 F.2d 324 (2nd Cir. 1982). Thus, there is a direct conflict between the Seventh and Second Circuits on when, under *Kubrick*, a cause of action accrues.

In *Kubrick*, this Court equated knowledge of the plaintiff's "injury and its cause" with "possession of the critical facts that he has been hurt and who has inflicted the injury," at least when the facts about causation are in the control of the putative defendant. *Kubrick* at 122. Nonetheless the *NAVCO* court states that knowledge of "who has inflicted the injury" is irrelevant when fixing an accrual date. In fact, the rationale of this Court's ruling was quite explicit:

> We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.

Kubrick at 122.[7]

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[7] It is an inherent problem of withdrawal liability cases that the knowledge of controlled group relationships is in the control of putative defendants and not the Pension Fund. *Barker & Williamson, supra* 788 F.2d at 128; *Central States Pension Fund v. Stotky*, 956 F.2d 1369, 1373 (7th Cir. 1992).

Kubrick's distinction between ignorance of legal rights and ignorance of the underlying *actionable* facts was seemingly lost on the court below, which wrote: "If a claim accrues even though the victim does not know that he has a legal entitlement to recover, the fact that the victim does not know who would be the right defendant cannot matter." *NAVCO*, App. A at 5a. This statement overlooks the practical reality confronting a plaintiff who has claims against multiple parties for the same injury. *Dubose, supra* at 1031. The plaintiff may know at once that he has been injured and even know the identity of one of the parties who caused the injury. However, he may not know the identity of *all* the parties that have caused the injury, and this is not simply due to ignorance of his "legal entitlement" (in the words of *NAVCO*). The plaintiff—like Central States in this case—may have been deprived of basic *factual* knowledge needed to link a particular defendant to the injury.

In *Barrett v. United States, supra*, 689 F.2d 324, the Second Circuit addressed a nearly identical issue. There, a personal representative brought an action pursuant to the FTCA, alleging (1) that the government was negligent in the creation and administration of the Army's chemical warfare program; and (2) that certain parties conspired to cover up the facts of the decedent's death. Reversing the district court's entry of summary judgment in favor of the Army, the Second Circuit found that an issue of fact existed as to whether the government engaged in concealment and whether diligence was exercised by the plaintiff's estate in attempting to identify "*who*" was responsible for the untimely death of the decedent. *Barrett*, 689 F.2d at 330 (emphasis added). The court explained that "[t]his case presents an instance in which *knowledge of the identify of the tortfeasor* is a critical element to the accrual of a claim." *Barrett* at 330 (emphasis added). The court observed that, since the Army may have concealed the tortfeasor's identity, the cause of action may not have "accrued" until the Secretary of the Army re-

vealed that the decedent died from the injection of a mescaline derivative administered to him while he unknowingly served as a test subject in an Army chemical warfare experiment. *Barrett* at 330.

The *NAVCO* court's decision also conflicts with the Sixth Circuit's decision in *Diminnie v. United States*, 728 F.2d 301 (6th Cir.), *cert. denied*, 469 U.S. 842 (1984). There, the court considered an action brought under the FTCA, "asserting a wide variety of claims arising from Diminnie's arrest, trial and conviction." *Diminnie* at 302. Reviewing *Barrett*, the Sixth Circuit ruled that the *accrual* of a cause of action under the FTCA may be deferred "because of the plaintiff's *inability to identify the party whose conduct triggered the injury*," if that party played a wrongful role in concealing his identity. 728 F.2d at 305 (emphasis added).[8] Compare, *Harrison v. United States*, 708 F.2d 1023, 1028 (5th Cir. 1983), stating in dicta that, because of the defendant's concealment, the law imposes "a heavier burden in showing that the plaintiff possessed the level of knowledge required to commence accrual of the period of limitations."[9]

Barrett, *Diminnie*, and *Harrison* accord with *Northern California Retail Clerks Pension Fund v. Jumbo Markets, Inc.*, 906 F.2d 1371 (9th Cir. 1990), an action brought by an ERISA fund to collect pension contributions. There, the Ninth Circuit held that, when an employer fails to report the amount of contributions owed to the penison fund, the statute of limitations for an action to collect unpaid contributions does not "accrue" until the pension fund has "reason to know" of the alleged underpayment. This is analytically the same as the present case. In this case Petitioners could not know of Respondents'

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[8] *See also Fitzgerald v. Seamans*, 553 F.2d 220, 229 (D.C. Cir. 1977).

[9] In appropriate concealment cases diligence of plaintiff may not be required at all. *Baskin v. Hawley*, 807 F.2d 1120 (2nd Cir. 1986).

failure to pay at least until they knew of the existence of Respondents and their controlled group relationship with U.S. Bedding and Englander. Further, Respondents had a duty to inform Petitioners of their identity as a member of the statutory controlled group and they failed to comply with that duty.

Barrett, Diminnie, Harrison, and *Jumbo Markets* all stand for the proposition that concealment by the defendant of the identity of one of the perpetrators of an injury will delay the "accural" date of a federal cause of action.[10] The *NAVCO* court's decision stands in marked contrast. Because this issue potentially applies to the accrual of any federal cause of action, it is imperative that a uniform standard be adopted for use throughout the country. For this reason, among others, Petitioners submit that a writ of certiorari should issue.

B. Certiorari Is Warranted Here Because The Seventh Circuit's Decision Undermines Significant ERISA Policies.

1. The conflict with *Sandoz Masonry's* policy discussion.

Apart from the conflict noted above, the Seventh Circuit's decision ought to be reviewed by this Court because it fails to account for, and thus frustrates, the policies underlying ERISA.

This Court in *Kubrick* established a flexible standard, designed to recognize and accommodate the legislative policies and purposes underlying a statute, and the difficulties inherent in prosecuting a statutory action. *Dubose v. Kansas City S. Ry. Co.*, 729 F.2d 1026 (5th Cir.), *cert. denied*, 469 U.S. 854 (1984). The *NAVCO* court's

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[10] This is also consistent with *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234 (1959), where this Court stated that, with respect to the statute of limitations, no man can take advantage of his own wrong.

decision, however, fails to consider these factors. It focuses, instead, upon a perceived need to ensure prompt action to collect withdrawal liability assessments. The court wrote: "Congress told the trustees of pension funds *not to tarry* in assessing and collecting liability. The fund shall compute liability and demand payment '[a]s soon as practicable after an employer's complete or partial withdrawal.' 29 U.S.C. § 1399(b)(1)." App. A at 9a (emphasis in original).[11]

While it is true, as the court states, that statutes of limitations serve vital social interests, these social interests—"the usual ones of preventing stale claims that may be hard to prove, and protecting the interest of potential defendants in knowing their liabilities," App. A at 8a —must be weighed against the social interests expressed in the main, substantive body of the legislation. This view is well expressed by the D.C. Circuit in *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1125-27 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989), the only other appellate decision which addresses the statute of limitations for collection of withdrawal liability.

In *Sandoz Masonry*, the defendant interposed a statute of limitations defense. Revisiting the general interests served by limitations provisions, and weighing them with the interests inherent to the collection of withdrawal liability, the D.C. Circuit stated:

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[11] The Seventh Circuit's reliance upon 29 U.S.C. § 1399(b)(1) for the view that pension plans must not delay in filing suit against controlled group members is entirely misplaced, since that provision relates solely to the time period existing between the date of withdrawal and the service of the notice and demand for payment. It does not relate to the time for bringing suit, after default on the notice and demand, as that period is covered by the applicable statute of limitations. Here Central States did comply with § 1399(b)(1) by issuing its assessment and filing claims immediately against all known members of the U.S. Bedding group of trades or businesses.

> Sandoz's reading of the purposes and policies animating the MPPAA is curiously one-dimensional. To be sure, Congress has indicated that promptly collecting outstanding sums is desirable. That indication, however, is one aspect of the Act's more general purpose of ensuring that plans collect the amounts due from employers, a purpose subsidiary to the Act's overriding purpose of ensuring that plans remain solvent despite employer withdrawals (and thus able to provide pension payments to workers who have earned them). The employer's reading of the statute would elevate one narrow statutory policy (favoring prompt collection) over the more general goal (collection) and overriding purpose (solvency) which animate and generate that narrow preference. There is no indication that the Act requires, as Sandoz would have it, either prompt collection or no collection at all. Rather, the Act requires that the plan sponsor act "as soon as practicable after an employer's complete . . . withdrawal." 29 U.S.C. § 1399(b)(1).

871 F.2d at 1126.

Because the *NAVCO* decision plainly disregards the policies animating the D.C. Circuit's decision in *Sandoz Masonry* [12] and subjects Petitioners to a completely different approach to the collection of withdrawal liability, this Court's intervention is needed. This Court should grant the petition in order to eliminate the conflict in appellate

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[12] These policies are echoed in *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127 (3rd Cir. 1986), where the court stated:

> The MPPAA was designed "(1) to protect the interests of participants and beneficiaries in financially distressed multiemployer plans, and (2) . . . to ensure benefit security to plan participants." H.R. Rep. No. 869, 96th Cong., 2d Sess. 71 reprinted in 1980 U.S. Cong. & Ad. News 2918, 2939.
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> * * * *
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> Courts have indicated that because ERISA (and the MPPAA) are remedial statutes, they should be liberally construed in favor of protecting the participants in employee benefit plans.

approaches to the enforcement of ERISA, by fixing a uniform accrual date.

2. The *NAVCO* court made 29 U.S.C. § 1451(f)(2) superfluous.

Congress enacted MPPAA to protect the interests of participants and beneficiaries of multiemployer plans by ensuring that these plans would be financially stable. 29 U.S.C. § 1001a. The *NAVCO* decision, however, does just the opposite and, as a result, must be corrected by this Court.

As part of its overall remedial scheme, Congress included comprehensive limitations provisions, found at 29 U.S.C. § 1451(f)(1) and (2). Section 1451(f)(2), as an alternative to § 1451(f)(1), expressly applies to actions involving concealment. The decision below, however, strips § 1451(f)(2) of all operative effect in withdrawal liability actions since pension funds will always know, in practice, when the contributing member of a controlled group fails to make payment. Thus, because the Court held that this fact—non-payment by one entity—triggers the accrual of withdrawal liability claims against each member of the group under § 1451(f)(1), even claims against non-contributing, unknown group members, it renders § 1451(f)(2) superfluous. Indeed the *NAVCO* court's analysis turns § 1451(f)(2) on its head by suggesting its purpose is to cap the statute at six years rather than to extend the statute by up to six years in the case of concealment. App. A at 11a.

Read together with 29 U.S.C. §§ 1399(a) and 1104 (a)(1)(A)(ii), a role for 29 U.S.C. § 1451(f)(2) clearly emerges. The cornerstone of the analysis is 29 U.S.C. § 1399(a) which provides:

> An employer *shall*, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be

> necessary to enable the plan sponsor to comply with the requirements of this part. [Emphasis added.]

A timely and truthful § 1399(a) response from the employer helps defray administrative expenses, as required by 29 U.S.C. § 1104(a)(1)(A)(ii), by establishing the direction and scope of a plan's controlled group investigation. A timely and truthful § 1399(a) response assures immediate accrual of a cause of action from the date of non-payment for purposes of the six-year limitations period under 29 U.S.C. § 1451(f)(1). Unanswered § 1399(a) inquiries or untruthful responses trigger § 1451 (f)(2)'s limitations provision. Employers who do not answer § 1399(a) inquiries, or answer them untruthfully are guilty of "fraud or concealment" and the cause of action against them does not accrue immediately. *See Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (disregard of a statutory duty to disclose tolls the statute of limitations).

This position has much to recommend it: symmetry and certainty are promoted (to say nothing of its faithfulness to principles of statutory construction); moreover, a remedy is imposed against uncooperative and deceitful employers, while repose is given to honest employers.

The Seventh Circuit's decision, however, confers immunity to employers who fail to obey the affirmative command of 29 U.S.C. § 1399(a). This is wrong in view of the remedial goals Congress intended for MPPAA. The question then becomes, "What sanction is appropriate?" For the reasons already discussed, 29 U.S.C. § 1451(f)(2) imposes the most logical sanction—it delays the accrual of a withdrawal liability action and, thus, denies uncooperative and deceitful employers the repose they would otherwise enjoy.

The Seventh Circuit's view thus weakens ERISA, while the position Petitioners advocate supports ERISA purposes in a manner consistent with its language, by (i)

imposing a sanction for 29 U.S.C. § 1399(a) violations and, in the process, (ii) reserving a role for 29 U.S.C. § 1451(f)(2).

In sum § 1451(f)(2) may be viewed as a codification of the two-pronged *Kubrick* standard of knowledge of the injury and its cause. The Seventh Circuit's disregard of this provision, and the ERISA policies it advances, has led it to this conflict with *Kubrick* and *Barrett*. This Court should grant the Petition to resolve the conflict.

III. THE COURT BELOW EMPLOYED THE WRONG STANDARD OF REVIEW: IT HELD PETITIONERS ACCOUNTABLE FOR FAILING TO MAKE A RECORD OF DILIGENCE FOR SUMMARY JUDGMENT WHEN IN FACT THE DISTRICT COURT RULED WITHOUT A RECORD ON RESPONDENTS' MOTION TO DISMISS.

The defendants (Respondents herein) filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which the district court granted. On appeal, however, the court below erroneously believed that the procedural basis of defendants' motion was summary judgment under Fed. R. Civ. P. 56. The court then looked for a record of diligence by Petitioners that might support equitable relief, but it found none. For example, the court found that Petitioners had not explained how the action against the defendants was discovered. The court also found that Petitioners were not diligent in pursuit of the defendants. *NAVCO*, App. A at 3a, 12a. On petition for rehearing, Petitioners presented the court below with a twelve page affidavit which outlined the numerous steps they took to identify the defendants subsequent to their 1983 withdrawal (including the very steps the court thought to be indicative of diligence). Since the district court dismissal had foreclosed the opportunity to make such a record, Petitioners sought a remand for that purpose. The court below stated, however, that Petitioners had waived the right to present this factual argument since it had not

been previously presented to the court. *See* Order Denying Petition for Rehearing With Suggestion for Rehearing In Banc, dated September 20, 1993. Appendix D at 27a. In this regard, the court simply erred, both factually and legally, causing serious injury to the interests served by ERISA.

With respect to the court's factual error, this Court need look no further than the transcript of the oral argument on Petitioners' appeal. There, Petitioners advised that, on remand to the district court, they would show their diligence in pursuing their claim. Diligence was also raised in Petitioners' appellate briefs.[13] The briefs argued that Petitioners were eligible for equitable relief; that a dismissal under Rule 12(b)(6) was therefore improper; and that Petitioners were entitled to make a record (on remand) to support their equitable claims. The diligence argument was thus implicit in Petitioner's request for remand to make a record.

The court's legal error—its failure to allow Petitioners the opportunity to present evidence on the question of diligence—is important in its impact on the orderly process of withdrawal liability claims. A Fed. R. Civ. P. 12(b)(6) motion does not test the truth of facts alleged in a complaint. Instead, dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). These same principles constrained the D.C. Circuit in *Richards v. Mileski*, 662 F.2d 65 (D.C. Cir. 1981). There, in denying the defendants' statute of limitations motion, the court stated:

> There is an inherent problem in using a motion to dismiss for purposes of raising a statute of limitations

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[13] An excerpt of this section of Petitioners' brief on appeal is included at App. E at 28a-31a. An excerpt of the reply brief is included at App. F at 32a.

> defense. Although it is true that a complaint sometimes discloses such defects on its face, it is more likely that the plaintiff can raise factual setoffs to such an affirmative defense.
>
> * * * *
>
> We do not hold that the use of a motion to dismiss is always improper to raise a statute of limitations defense, but we do suggest that a responding party often imposes an undue burden on the trial court and impedes the orderly administration of the lawsuit when he relies on a motion to dismiss to raise such an affirmative defense. On remand, and upon filing an appropriate responsive pleading, the appellees will be free to present whatever evidence they have to Richards' dilatory behavior, if any. In the current posture of the case, however, it was error to dismiss the action on the basis of an affirmative defense without any responsive pleading from the defendants.

Richards, 662 F.2d at 73.[14]

Likewise, in *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336 (D.C. Cir. 1991), a case involving an assertion by the employer that the pension fund's claim for contributions was barred by the statute of limitations, the United States Court of Appeals for the District of Columbia Circuit ruled that the question of whether the pension fund used due diligence in determining whether additional contributions were due could not be resolved by a summary judgment motion. *See also Robertson v. Seidman & Seidman*, 609 F.2d 583 (2nd Cir. 1979); *Williams v. Hartje*, 827 F.2d 1203 (8th Cir. 1987).

The *NAVCO* court was presented with a decision by the district court that was based upon Fed. R. Civ. P.

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[14] The Court noted in footnote 6, "We do no more than add to an overwhelming line of authority. *See e.g., Glus v. Eastern Brooklyn Terminal*, 359 U.S. 231, 235, 79 S.Ct. 760, 763, 3 L.Ed.2d 770 (1959) (question of plaintiff's diligence "cannot be decided at this state of the proceedings," on a motion to dismiss) . . . ."

12(b)(6), not Rule 56 as the court incorrectly noted. Moreover, the court's opinion contains factual findings regarding Petitioners' diligence, although the district court made no such findings and did not consider the matter. When this fact was brought to the court's attention in a motion for rehearing, the court stated that Petitioners had waived their right to make such an argument, despite the fact that the court had been advised in briefs and at oral argument that equitable doctrines were applicable, and that Petitioners would present facts, if given an opportunity to do so, establishing their diligence.

The summary action taken by the court runs contrary to the firmly settled judicial preference for deciding cases on "the basis of substantive rights rather than technicalities, [with Petitioners to] receive every reasonable opportunity to cure formal defects in their pleadings." *Richards, supra.* This is especially critical, given the nature of Petitioners' claim, that is, a claim for the collection of withdrawal liability under ERISA. The overriding purpose behind the enactment of MPPAA was to insure the financial solvency of pension plans. *Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1125-27. Like the defendants in *Sandoz Masonry*, the court below seems to favor a policy that is "curiously one-dimensional". *Id.* at 1126.

At a minimum, the court below should have given Petitioners the opportunity to present evidence of diligence in support of the equitable relief they sought. It failed to do so, however, and it is left to this Court to correct the appellate court's palpable error. Clearly, the action taken by the court has tilted the congressional balance in the wrong direction, permitting the defendants to take advantage of their own wrong.

CONCLUSION

The decision below conflicts with the decisions of the other courts of appeals, with the decision of this Court, and with the policies of ERISA. This Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 92-1968 & 92-2295

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 91 C 2624—John F. Grady, *Judge*

No. 92-2923

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 92 C 1810—Paul E. Plunkett, *Judge*

ARGUED JANUARY 19, 1993—DECIDED AUGUST 9, 1993

Before BAUER, *Chief Judge*, and COFFEY and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. During the fall of 1983 United States Bedding Company and The Englander Company filed petitions in bankruptcy. Both firms had been making contributions to multiemployer pension plans; they completely withdrew from these plans in January 1984. The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) permits an underfunded multiemployer pension plan to pursue a withdrawing employer for a portion of the plan's deficit. 29 U.S.C. § 1381. The plans assessed withdrawal liability aggregating $672,000. Despite some success in marshaling assets in bankruptcy, *In re United States Bedding Co.*, 52 B.R. 875 (Bankr. C.D. Cal. 1985), the employers have not satisfied any portion of their withdrawal liability.

The MPPAA provides that all members of a group under "common control" are liable for each other's withdrawal liability. 29 U.S.C. § 1301(b)(1). Both of the withdrawing firms were part of a corporate group under the umbrella of Van Vorst Industries, Incorporated. Van Vorst itself was a dry well, as were other corporate members of its family. The two pension funds believe that Navco, a partnership, also belonged to the Van Vorst group. Both funds filed suit against Navco and William L. Caldwell, its general partner (collectively Navco). Navco has invoked the statute of limitations in 29 U.S.C. § 1451(f):

> An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or

> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

Van Vorst and its affiliates withdrew early in 1984, yet one fund did not commence suit until 1991, and the other waited until 1992. Both suits came substantially more than six years after the withdrawals.

The suit by the Central States, Southeast and Southwest Areas Pension Fund (the Teamsters Fund) was assigned to Judge Grady. The pertinent dates are these. The employers finally withdrew by January 1984. On November 3, 1983, and again on March 14, 1984, the Teamsters Fund sent letters demanding that the employers identify other members of their corporate groups. See 29 U.S.C. § 1399(a). No replies were forthcoming. On April 6, 1984, the Teamsters Fund sent a formal notice of withdrawal liability and a demand for payment. The employers were supposed to pay immediately but had 60 days to "cure" any nonpayment. 29 U.S.C. § 1399(c)(2). That time expired on June 5, 1984. The Teamsters Fund filed its suit against Navco and Caldwell on May 1, 1991. Caldwell had been listed in the bankruptcy schedules as an equity investor in the employers. The Teamsters Fund claims that it did not discover Navco's existence until sometime during 1990; the Fund does not explain how Navco came to its attention. Judge Grady granted summary judgment for the defendants. He held that the suit is untimely under § 1451(f) because the claim accrued on June 5, 1984, when payment became delinquent, rather than when the Teamsters Fund discovered Navco's existence.

The suit by the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund

(the Independent Fund) was assigned to Judge Plunkett. The sequence is slightly different. The Independent Fund sent the employers a notice and demand on June 19, 1984, specifying a schedule of payments. The first payment was due on July 1, 1984, and additional payments were to be made each quarter through July 1, 1986. Not a cent was remitted in 1984 or at any later time. On August 28, 1990, the Independent Fund sent a letter to an attorney who had filed an appearance for U.S. Bedding in the bankruptcy action, asking for copies of the schedules filed in that case, a list of all equity investors in the firm, and "any information which indicates that these equity security holders owned any other corporation, partnership or sole proprietorship." No reply was forthcoming. The Independent Fund filed suit on March 13, 1992. It has not explained when or how it learned of Navco's existence. Like Judge Grady, Judge Plunkett granted summary judgment for the defendants. 800 F. Supp. 587 (N.D. Ill. 1992). Judge Plunkett concluded that the claim accrued on July 1, 1984, when the first payment was due, rather than quarterly as additional payments came due. The Independent Fund argued (as the Teamsters Fund had not) that the employers' failure to provide information about the control group tolled the statute of limitations. Judge Plunkett rejected this argument because, he held, the time limit established in § 1451(f) is a "jurisdictional" bar that may not be extended.

We have consolidated the pension plans' appeals from these decisions. Although we expressed concern at oral argument about appellate jurisdiction in the Independent Fund's case, study of the record has dispelled our worries. All claims against the four original defendants (Van Vorst and Elgea I, Inc., in addition to Navco and Caldwell) have been wrapped up (Van Vorst for lack of service, Elgea by default judgment), making the disposition final and appealable under 28 U.S.C. § 1291. By and large,

we treat the appeals as if there were only one employer and one fund making a single argument. We consider all of the arguments both funds present; details about which pension plan presented which argument are unimportant.

Both district judges concluded that the "cause of action arose" for purposes of § 1451(f) when the employers' debts to the pension plan became overdue, see *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1124 (D.C. Cir. 1989), rather than when they discovered the identity of persons who might be required to satisfy those debts. As soon as the 60-day grace period provided by § 1399(c)(2) expired, the funds could have commenced suit. They had been injured. That is the standard definition of the "accrual" of a claim.

Section 1451(f)(2) states a "discovery" rule, and a claim accrues under a discovery rule when the victim knows of his injury. The time begins even though the victim does not know that the injury is actionable. E.g., *United States v. Kubrick*, 444 U.S. 111, 119-22 (1979); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1465 (7th Cir. 1992); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). If a claim accrues even though the victim does not know that he has a legal entitlement to recover, the fact that the victim does not know who would be the right defendant cannot matter. Consider negligent medical treatment, the subject of *Kubrick*. The Court held that the patient's claim accrued when he learned that he had been injured by a drug administered to him, even though he did not know that the use of this drug was negligent. Under the circumstances, the victim's observation that he did not know which physician had prescribed or administered the drug could not have mattered. Or consider an accident in a state that permits actions directly against an insurer. Driver *D* runs down pedestrian *P*, who believes *D* destitute. Does *P*'s neglect to learn the identity of *D*'s insurer extend indefinitely the

time to commence an action against that insurer? Finally consider what is perhaps the closest analogy: a shell corporation *C*, operated by shareholder *S* without observing the corporate forms, defrauds victim *V*. Correctly believing that *C* is insolvent, *V* does not explore the possibility of piercing the corporate veil. Does *V*'s neglect extend the time to make a claim against *S*? We could not find any case so holding. Plenty of cases reject contentions that particular claims do not accrue until the victim finds out who can be obliged to pay. E.g., *Lundblad v. Celeste*, 874 F.2d 1097, 1104 (6th Cir. 1989), modified on other grounds, 924 F.2d 627 (1991) (in banc); *Dyniewicz v. United States*, 742 F.2d 484, 486 (9th Cir. 1984); *McDaniel v. Johns-Manville Sales Corp.*, 542 F. Supp. 716, 718 (N.D. Ill. 1982). Only one case, *Fitzgerald v. Seamans*, 553 F.2d 220, 229 (D.C. Cir. 1977), looks in the opposite direction, and that opinion relies on the doctrine of equitable tolling, a subject distinct from the time the claim accrues. We discuss equitable tolling below.

Six years from the time of the injury, which § 1451 (f)(1) affords as the minimum in every case, is generous. Congress appreciated that it might be difficult to ascertain the existence of a claim and track down persons liable under the Employee Retirement Income Security Act, a complex statute. (The MPPAA is an amendment to ERISA; § 1451 applies to all of ERISA.) Pension funds and other persons holding claims under ERISA can use that six years to investigate. And if the potentially liable person engages in fraud or concealment, then § 1451 (f)(2) affords six years from the discovery of the injury. The pension funds in our case, however, see the six years as a period of rest and recuperation. Only after knowing that they have not been paid, and recognizing who is liable, does the six years even start, the funds say. Yet if the time does not begin until the fund knows *everything* it needs to know—the existence of the debt, nonpayment, and the identity (and relation to the employer) of control

group members—why is the period so long? Statutes of limitations provide time within which a person who knows of an injury may conduct the investigation needed to learn whether he has a legal claim and, if so, who is liable. After completing the investigation, a pension fund should be able to make a demand (and, if necessary, file suit) in a matter of weeks. Allowing six years is understandable only on the assumption that the time was to be used to search for vital information. Both pension funds had ample time to explore questions about the Van Vorst corporate structure. They chose not to investigate and may not now insist that their own diffidence meant that the time did not even commence.

Any other approach would make the statute of limitations illusory. For it is not enough to know that a person slinks about in the background. Caldwell, after all, was identified in the bankruptcy filings as an investor, and the pension funds say that this was meaningless. In order to show that a person is liable as an "employer" by being involved in a control group, the funds must establish that the person actually controlled the trade or business in which the withdrawing firm was engaged. This can be a difficult task, as many recent cases in this circuit show. *Central States Pension Fund v. Johnson*, 991 F.2d 387 (7th Cir. 1993); *Central States Pension Fund v. Ditello*, 974 F.2d 887 (7th Cir. 1992); *Central States Pension Fund v. Personnel, Inc.*, 974 F.2d 789 (7th Cir. 1992); *Central States Pension Fund v. Koder*, 969 F.2d 451 (7th Cir. 1992); *Central States Pension Fund v. Slotky*, 956 F.2d 1369 (7th Cir. 1992). The implication of the pension funds' argument is that the time would not even commence until all ancillary questions about the scope of control and the nature of the business have been resolved. Doing the research on these questions is what the six years are for, and we therefore hold that the claim accrues as soon as payment becomes overdue.

What, then, of the possibility that payment can become overdue frequently? The Independent Fund set a quar-

terly schedule, and the last payment was not due until July 1, 1986. The Independent Fund filed suit within six years of that date. Judge Plunkett concluded that a pension fund's power to accelerate future installments once the employer misses a payment, 29 U.S.C. § 1399(c)(5); 29 C.F.R. § 2644.4, means that the whole sum becomes due, and the whole claim accrues, when the first payment is missed. This is the right conclusion, but we put it somewhat differently. The pension fund had only one *claim* against the employer (and, derivatively, against the controlling persons): the amount of withdrawal liability. Although a fund may permit an employer to amortize this sum over 20 years, 29 U.S.C. § 1399(c)(1)(B), the whole amount is presumptively due at the outset. Section 1391 calls on the pension plan to determine an amount that is owed; the financing options under § 1399(c) do not break this single debt into little pieces with their own statutes of limitations.

Suppose a pension fund, dissatisfied with our conclusion that it has "only" six years to track down members of control groups, decides to grant itself additional time. If each overdue payment starts a new six-year period, the pension fund could *decelerate* payment on default—say, converting from a two-year schedule (which the Independent Fund selected) to a twenty-year schedule. Extra time cannot harm the fund, given that an insolvent employer will not pay on any schedule. Then once it locates what it believes is a member of the control group, the fund may demand payment of the current installment and, when this is not forthcoming, accelerate all future payments under § 1399(c)(5) and file suit. Clever, but it ought not work. Turning six years into twenty-six is a job best left to magicians. Statutes of limitations serve vital social interests—the usual ones of preventing stale claims that may be hard to prove, and protecting the interest of potential defendants in knowing their liabilities, and in the MPPAA the unusual one of protecting the

beneficiaries of the fund. Congress told the trustees of pension funds *not to tarry* in assessing and collecting liability. The fund shall compute liability and demand payment "[a]s soon as practicable after an employer's complete or partial withdrawal." 29 U.S.C. § 1399(b)(1).

The trustees' obligation to act with dispatch distinguishes debts under ERISA from ordinary contractual debts, in which the debtor and creditor may agree on their own schedule—and in which, therefore, courts often say that there is no duty to accelerate and that each unpaid installment is a new claim. E.g., *Frenzel v. Frenzel*, 260 Iowa 1076, 152 N.E.2d 157 (1967); *Light v. Light*, 12 Ill. 2d 502, 147 N.E.2d 34 (1957). See Arthur Linton Corbin, 4 *Contracts* § 951 (1951). The schedule under § 1399(c), by contrast, is *not* contractual; the employer did *not* assent to a longer period for payment and suit. We have not seen any case extending the contractual approach to the MPPAA, and like the district court we believe that it would be imprudent to adopt a rule that relieves the pressure on trustees of pension funds to act with dispatch. Six years is quite sufficient; the trustees may not award themselves more.

Thus the six years began in 1984 and expired before either pension plan filed suit. The potential difference between § 1451(f)(1) and (2) need not detain us, because each pension plan "discovered" the nonpayment immediately. Even the proviso to § 1451(f)(2), awarding six years from discovery in the event of fraud or concealment, would not add a day to the six years available under § 1451(f)(1). (Correspondingly, we need not consider whether the control group's failure to stand up and identify itself is "concealment" for purposes of § 1451(f)(2).) Only the application of a tolling rule could enable either pension plan to recover.

Judge Plunkett concluded that tolling is unavailable because the time limit is "jurisdictional." He understood *Smith v. Chicago Heights*, 951 F.2d 834, 838 (7th Cir.

1992), to establish the principle that statutes of limitations applicable to claims "unknown to the common law" are jurisdictional and hence not subject to tolling or estoppel. The portion of *Smith* that contains this discussion dealt with Illinois law. There is no comparable rule when a federal statute supplies the period of limitations. To the contrary, periods of limitations in federal statutes—almost all of which establish rights "unknown to the common law"—are universally regarded as nonjurisdictional. E.g., *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392-98 (1982) (period for filing charges under Title VII of the Civil Rights Act of 1964 is subject to waiver and tolling). Only rules limiting the commencement of actions against the United States itself have been given the jurisdictional" treatment, on account of sovereign immunity rather than some principle distinguishing statutory from common law rights. Even the doctrine protecting the national government from tolling a period of limitations crumbled recently. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). We hold accordingly that § 1451(f) does not curtail the jurisdiction of the federal courts.

It does not necessarily follow that doctrines of tolling and estoppel are fully applicable. Principles of tolling and estoppel apply to most federal statutes of limitations but not all, as *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2782 (1991), shows. Sometimes Congress sets an outer bound on the time to commence an action, a statute of repose to compliment the period of limitations. *Lampf* holds that § 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e), establishes an unyielding three-year limit on the commencement of suits. Section 9(e) reads: "No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." The Court was im-

pressed by the dual periods: one running from discovery, and a longer period, serving as an outer limit, from the violation. The Court concluded that the "equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure." 111 S. Ct. at 2782. See also *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385, 1391-92 (9th Cir. 1990) (§ 13 of Securities Act of 1933, 15 U.S.C. § 77m, is not subject to tolling or estoppel). Section 1451(f) likewise establishes a split period: three years from discovery (§ 1451(f)(2)) and six years from the actual injury (§ 1451(f)(1)). There is even a proviso to § 1451(f)(2) adding three years for fraud or concealment. Provision in the statute for a defined extra time for fraud or concealment makes it problematic for judges to use acts of the sort to which these pension funds point —silence in response to inquiries, a mild form of "concealment"—as a reason to grant time *beyond* six years. Unlike § 9(e) of the Exchange Act, however, § 1451(f) of ERISA does not specify a maximum time measured from the violation, so perhaps there is room for some tolling doctrines. But we must be careful not to use tolling principles to contradict the legislative decision that fraud and concealment justify six years from discovery, not more.

Today's case is not an occasion to determine the limits to equitable extensions under ERISA. Federal law contains two kinds of time-extending principles: equitable estoppel and equitable tolling. Equitable estoppel "denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time." *Cada*, 920 F.2d at 451. *Cada* gave as an example a promise not to plead the statute of limitations. Navco and Caldwell did not attempt to deceive the pension funds or induce them to defer suing. Equitable tolling, the other doctrine, "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain

vital information bearing on the existence of his claim." *Ibid.* This doctrine is potentially important in control group cases, because sometimes even six years will not be long enough to round up every last member. But equitable tolling hardly helps the pension funds, which were not "diligent" even by the standards of the Soviet Union. (Where labor's motto was: "We pretend to work, and they pretend to pay us.")

The Teamsters Fund sent letters in November 1983 and March 1984, after which it fell silent. The Independent Fund did not inquire until August 1990—when by our reckoning the six years had expired. Then it asked for schedules filed in the bankruptcy case, plus any other information the attorney cared to provide. Relying on a lawyer whose client had ceased to exist (U.S. Bedding's bankruptcy had been converted to a Chapter 7 liquidation and a trustee appointed) is problematic. The Independent Fund itself may have had the files in the bankruptcy case, or readily could have obtained them from the court; it was one of the firms' largest creditors. From these files the Independent Fund could have learned about Caldwell and asked him some questions. Either fund could have consulted Dun & Bradstreet or an equivalent service to find out what was publicly known about the firms' sources of capital. Either fund could have learned about Van Vorst's corporate structure by consulting the filings in that firm's bankruptcy, ongoing since November 1983. Reasonably diligent entities claiming that they are owed two thirds of a million dollars do that and more.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

February 14, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 2624

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs,

v.

VAN VORST INDUSTRIES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Defendants William M. Caldwell, III and Navco ("defendants") have moved to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the foregoing reasons, the court grants defendants' motion.

FACTS

United States Bedding Company and The Englander Company were required to make contributions to the Central States, Southeast and Southwest Areas Pension Fund (the "Fund"). Those companies, along with Van Vorst Corporation, Southern Cross Industries, Van Vorst Industries, Inc., Navco, and Elgea I, Inc., (collectively, "Van Vorst Controlled Group" or "Group") are treated as a single employer for withdrawal liability purposes. The Van Vorst Controlled Group completely withdrew

from the Fund and, as a result, Group members incurred joint and several liability in the amount of $619,453.71. On or about November 3, 1983, plaintiffs sent a Statement of Business Affairs to the Group, pursuant to 29 U.S.C. § 1399(a), in which they requested answers to liability questions. On or about March 14, 1984, plaintiffs sent another Statement of Business Affairs to the Group. The defendants did not answer and return either of these statements. On or about April 6, 1984, the Fund issued a Notice and Demand for Payment of Withdrawal to the Group. The Fund has not received any payment. Plaintiffs filed this complaint against Van Vorst Industries, Inc., Elgea I, Inc., Navco and William L. Caldwell, III on May 1, 1991, pursuant to 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1). Defendants have moved to dismiss on the ground that the complaint was not brought within the applicable statute of limitations in 29 U.S.C. § 1451(f).

DISCUSSION

In considering a motion to dismiss, a court must accept the facts alleged in the plaintiff's complaint as true and must draw reasonable inferences from the pleadings in plaintiff's favor. *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir. 1989). Dismissal is appropriate " 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *Kunik v. Racine County, Wisconsin*, 945 F.2d 1574, 1579 (7th Cir. 1991) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

Section 1451(f) provides that

> [a]n action under this section may not be brought after the later of (1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud

> or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

29 U.S.C. § 1451(f). The key issue here is when plaintiffs discovered their cause of action. Defendants argue that plaintiffs discovered the cause of action by June 1984, when defendants did not meet plaintiff's demand for payment, and that the complaint had to be filed—at the latest—by June 1990. Memorandum in Support of Motion of Defendants Navco and William Caldwell to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, at 3-6. Plaintiffs respond that they did not discover the cause of action until 1990 when they knew that they had a claim against Navco and Caldwell, and that they filed the complaint in 1991, well within either provision of the 1451(f)(2) time bar. Plaintiffs' Brief in Response to Motion to Dismiss of Defendants, William Caldwell, III and Navco, at 7-10 ("Plaintiffs' Brief").

The "discovery rule" of federal common law has been described in the following manner:

> Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date —often the same, but sometimes later—on which the plaintiff discovers that he has been injured.

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). This discovery rule has been codified in the ERISA statute. An action may be brought no later than three to six years after plaintiffs have discovered their cause of action or injury.

According to the D.C. Circuit, under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1381-1461, "failure to meet the [plan sponsor's] demand [for payment] gives rise to the injury which the suit is designed to redress (and thus

to a 'cause of action')." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1124 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989). The court agrees with this interpretation of the MPPAA. Plaintiffs knew of their injury, nonpayment, and thus, this cause of action, when demand was made upon the Van Vorst Controlled Group and payment was not made by any Group members in June of 1984. *See* 29 U.S.C. § 1399(c)(2) (payment due within 60 days after demand). Plaintiffs should have filed this complaint by 1987, or, at the latest, by 1990.[1] To interpret the statute otherwise, would give plaintiffs limitless time to file a complaint against defendants, thus vitiating the clear purpose of providing a specific time limitation in the Act itself.

Plaintiffs argue that the statute of limitations should be interpreted liberally to give them time to discover who injured them, pointing out that courts have recognized that pension funds often lack knowledge of controlled group relationships. This recognition, plaintiffs argue, is evidenced by the holding that notice of liability to one controlled group member constitutes notice to all control group members. Plaintiffs' Brief, at 10 n.10; *see IUE AFL-CIO Pension Fund v. Barker & Williamson*, 788 F.2d 118, 128 (3rd Cir. 1986). But it can be argued that this notice rule should alert pension funds to the possible difficulty of discerning the identities of the different controlled group members. When plaintiffs were aware that they had not been paid, they should have investigated and sued, within the statute of limitations period, those group members of which they were aware.

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[1] The court does not reach the issue of which ERISA statute of limitations provision applies, because it is not necessary to do so in this case.

Plaintiffs did not raise the issues of equitable tolling or equitable estoppel. In any event, the MPPAA statute of limitations may be jurisdictional and thus not subject to equitable tolling and estoppel. *See Smith v. City of Chicago Heights*, No. 90-2976, slip op. at 6-7 (7th Cir. Jan. 13, 1992).

Once the suit had been instituted, discovery could have been conducted to determine the identities of the other members in time to join them within the limitations period.

CONCLUSION

For the foregoing reasons, the court grants the motion of defendants William L. Caldwell, III and Navco to dismiss this cause as barred by limitations. The dismissal will be with prejudice.

DATED: February 14, 1992

ENTER:

/s/ John F. Grady
United States District Judge

APPENDIX C

March 27, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 2624

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Plaintiffs,

v.

VAN VORST INDUSTRIES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs have moved to alter or amend the court's judgment of February 14, 1992, in favor of defendants William L. Caldwell, III, and Navco. For the reasons stated below, plaintiffs' motion is denied.

FACTS

United States Bedding Company and The Englander Company were required to make contributions to the Central States, Southeast and Southwest Areas Pension Fund (the "Fund"). Those companies, along with Van Vorst Corporation, Southern Cross Industries, Van Vorst Industries, Inc., Navco,[1] and Elgea I, Inc., (collectively, "Van Vorst Controlled Group" or "Group") are treated as a single employer for withdrawal liability purposes. The Van Vorst Controlled Group completely withdrew

[1] William L. Caldwell, III was the general partner of Navco.

from the Fund and, as a result, Group members incurred joint and several liability in the amount of $619,453.71. On or about November 3, 1983, plaintiffs sent a Statement of Business Affairs to the Group, pursuant to 29 U.S.C. § 1399(a), in which they requested answers to liability questions. On or about March 14, 1984, plaintiffs sent another Statement of Business Affairs to the Group. The defendants did not answer and return either of these statements. On or about April 6, 1984, the Fund issued a Notice and Demand for Payment of Withdrawal to the Group. The Fund has not received any payment. Plaintiffs filed this complaint against Van Vorst Industries, Inc., Elgea I, Inc., Navco and William L. Caldwell, III on May 1, 1991, pursuant to 29 U.S.C. §§ 1132(a)(3) and 1451(a)(1). Defendants William L. Caldwell, III, and Navco ("defendants") moved to dismiss on the ground that the complaint was not brought within the applicable statute of limitations in 29 U.S.C. § 1451(f). The court granted defendants' motion. Plaintiffs now move to alter or amend the court's judgment.[2]

DISCUSSION

In its previous opinion, the court decided that plaintiffs had failed to sue defendants within the time period prescribed in 29 U.S.C. § 1451(f). That section provides that

> [a]n action under this section may not be brought after the later of (1) 6 years after the date on which the cause of action arose, or (2) 3 years after the

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[2] In plaintiffs' motion to alter or amend, plaintiffs state that "[n]oticeably omitted [from the facts] by the Court . . . is the important fact that U.S. Bedding and Englander filed for bankruptcy seeking Chapter 11 protection from their creditors and were subject to the jurisdiction of the Bankruptcy Court during all relevant periods of the underlying action." Brief in Support of Motion to Alter or Amend ("Plaintiffs' Brief"), at 3. Plaintiffs have not attempted to show how this fact is relevant to defendants' motion to dismiss on statute of limitations grounds.

> earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

29 U.S.C. § 1451(f). This court stated that

> [a]ccural is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date —often the same, but sometimes later—on which the plaintiff discovers that he has been injured.

Central States, Southeast and Southwest Areas Pension Fund v. Van Vorst Inds., Inc., No. 91 C 2624, slip op. at 3 (N.D. Ill. Feb. 14, 1992) (quoting *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991)). This court held that

> "failure to meet the [plan sponsor's] demand [for payment gave] rise to the injury which the suit [was] designed to redress (and thus to a 'cause of action')." . . . Plaintiffs knew of their injury, nonpayment, and thus, this cause of action, when demand was made upon the Van Vorst Controlled Group and payment was not made by any Group members in June of 1984.

Van Vorst Inds., Inc., slip op. at 4 (quoting *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1124 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989)).

Plaintiffs argue that when a demand for payment has not been met a separate cause of action arises against each controlled group member when plaintiffs discover (or should have discovered) the member's identity. *See* Plaintiffs' Brief, at 7-8. Plaintiffs assert that *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied, Bren-*

nan v. Hobson, 470 U.S. 1084 (1985), and *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3rd Cir. 1988), support their interpretation. Neither case is an ERISA case interpreting the statute of limitations applicable in this case. Further, the accrual rules in those cases appear to conflict with *Cada*'s rule that accrual occurs when the plaintiff discovers that he has been injured. In any event, it is possible that the rules in those cases are consistent with the rules applied in this case. In *Hobson*, the D.C. Circuit stated that "a plaintiff may [not] postpone suit until he knows every defendant by name and title," but the plaintiff must have been "on notice of all possible defendants, and not just a subgroup, as well as the particular cause of action." 737 F.2d at 36. The facts of this case are unlike the facts of *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977), which *Hobson* cited as illustrative of this notice rule. In *Fitzgerald*, the plaintiff, a former Air Force employee who had sued Air Force officials for improper discharge, was allowed to bring a later action against a White House official because there was no reason he should have known of any White House involvement in his discharge. 553 F.2d at 229. Here, although plaintiffs argue that they did not know every defendant when demand for payment was not met, they were aware that a controlled group existed. *See* Plaintiffs' Brief, at 2 (plaintiffs sent Statements of Business Affairs to Group). In *Keystone*, the Third Circuit stated that "[i]t is generally the case that a claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of injury." 863 F.2d 1125, 1127 (3rd Cir. 1988). It is unclear from the context of that case, which involved RICO, whether the Third Circuit, in using the phrase "source of injury," meant defendant's identity or simply how the injury was caused.

Plaintiffs also assert that *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, No. 90-3546, slip op. (7th Cir. Feb. 24, 1992), supports their reading

of the limitations period. Plaintiffs' Brief, at 11-12. The court disagrees. In *Slotky*, after Stevens Bedding Warehouse, Inc. ("Stevens") withdrew from its pension plan, the plan mailed notice and demand for payment to Stevens. *Id.* at 2. Under the facts of the case, Burton Slotky was part of the controlled group liable for withdrawal. *See id.* at 2-8. The plan did not give notice and demand to Slotky. *See id.* at 2-3. According to §§ 1399(b)(2)(A) and 1401(a)(1), arbitration must be initiated within a prescribed time period from the time that notice and demand are made. *See id.* at 2. Slotky failed to initiate arbitration within that time period. *See id.* at 3. The Seventh Circuit stated that "notice to one member of a controlled group is notice to all" so that Slotky waived his arbitration rights when he did not initiate proceedings within the prescribed time period. *See id.* at 4, 8.

Slotky appears to support this Court's decision. Section 1399 refers to only one "notice and demand." *Slotky* holds that notice to one controlled group member is notice to all controlled group members. It follows that demand upon one member constitutes demand upon all members. And because the cause of action against a known group member arises after demand for payment has not been met, the cause of action against all group members arises at that same time. Moreover, because both the availability of arbitration and the accrual of the limitations period depend upon when "notice and demand" are made, and a controlled group member can only initiate arbitration within the same time period as other members, it is logical that the plan should only be able to bring suit against the member within the same time period as it can against other members. Furthermore, the court's interpretation of § 1451 is consistent with most statutes of limitations which arise upon the injury (or discovery of the injury) to the plaintiff, not upon the plaintiff's discovery of the defendant's identity. *See, e.g., Guebard v. Jabaay,* 381 N.E.2d 1164, 1167 (Ill. App.

1978), *appeal after remand*, 452 N.E.2d 751 (Ill. App. 1983).

Plaintiffs argue that the policy behind the notice rule favors their interpretation of the statute of limitations. Plaintiffs' Brief, at 11-12. The Seventh Circuit stated that "[t]here is nothing unreasonable about requiring the notified firm to notify the other members of the controlled group rather than requiring the pension plan to thread what may be a maze of intercorporate relations to establish the bounds of the group.'" *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, No. 90-3546, slip op. at 9 (7th Cir. Feb. 24, 1992). This court's interpretation of § 1451 does not require controlled group members to "thread what may be a maze." If plaintiffs wanted to enforce their right to receive information about the group members,[3] they could have come to court within the limitations period to enforce this right. *See Goldowitz & Gigot, The Controlled Group Rule for Purposes of Withdrawal Liability Provisions of the Employee Retirement Income Security Act*, 90 W. Vir. L. Rev. 773, 791-92 (1988).

Plaintiffs also argue that the court's interpretation of the statute effectively makes § 1451(f)(2) a nullity. Plaintiffs' Brief, at 4-6. But § 1451 applies to more than withdrawal liability. In *Clyde Sandoz Masonry*, the D.C. Circuit addressed the employer's argument that subsection (f)(2) would never be applicable if the limitations period began to run at the time an employer failed to pay after demand. The D.C. Circuit stated that

> the time bar applies to "[a]n action under this section." Section 1451, situated at the beginning of the

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[3] Section 1399(a) provides that "[a]n employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part." 29 U.S.C. § 1399(a).

> subtitle part entitled "enforcement," is hardly limited to the type of suit before us. Instead, section 1451 applies to suits brought by a wide variety of parties. Additionally, the section applies to recovery by a party "adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan." That subtitle, 29 U.S.C. §§ 1381-1453 (governing, among other things, employer withdrawals, transfers of plan assets, reorganizations of plans, and benefits after termination of plans), extends to matters far beyond collection of withdrawal liability. Like suits involving these other parties adversely affected in these other matters, even suits brought by plan sponsors seeking to claim withdrawal liability may perhaps independently rely upon the discovery prong of the time bar when "default" occurs for reasons other than the employer's failure to meet a sponsor's demand for payment.

Clyde Sandoz Masonry, 871 F.2d at 1125 (citations omitted).

Finally, plaintiffs argue that the court's interpretation of the limitations period does not give effect to the fact that controlled group members have joint and several liability. Plaintiffs state that a defendant who is jointly and severally liable cannot use a statute of limitations defense that is available to a co-defendant. Plaintiffs' Brief, at 9-10. The court agrees. However, that is simply not occurring here. Navco and William L. Caldwell III both have raised timely statute of limitations defenses, and no other parties have been (or will be) allowed to raise Navco and William L. Caldwell's defenses. Joint and several liability allows plaintiffs to recover the entire withdrawal liability amount from any controlled group member if the controlled group member is sued within the limitations period. The court's interpretation of § 1451 does not prevent this from occurring.

CONCLUSION

For the foregoing reasons, the court denies plaintiffs' motion to alter or amend.

DATED: March 27, 1992

ENTER: /s/ John F. Grady
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 20, 1993

Before HON. WILLIAM J. BAUER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge

Nos. 92-1968 & 92-2295

CENTRAL STATES, SOUTHEAST AND SOUTHWEST
AREAS PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 91 C 2624—John F. Grady, *Judge*

No. 92-2923

CHICAGO TRUCK DRIVERS, HELPERS AND WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND, *et al.*,
Plaintiffs-Appellants,

v.

NAVCO and WILLIAM L. CALDWELL, III,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

No. 92 C 1810—Paul E. Plunkett, *Judge*

ORDER

Plaintiffs-Appellants filed petitions for rehearing and suggestions of rehearing en banc on September 7, 1993. No judge in regular active service has requested a vote on the suggestions of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The Teamsters Fund's argument that it was diligent in seeking control group members was not presented to the panel prior to decision, and is thus waived. The petitions for rehearing are therefore DENIED.

APPENDIX E

EXCERPT FROM BRIEF OF APPELLANTS CENTRAL STATES PENSION FUND, *ET AL.*, IN THE COURT BELOW

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II.

BOTH ERISA AND FEDERAL COMMON LAW PROVIDE RELIEF FROM THE OPERATION OF THE STATUTE OF LIMITATIONS IN THIS CASE.

Even if the district court were right that § 1451(f)(1) by itself would bar this action, it erroneously failed to apply the exceptions of § 1451(f)(2) that would have extended the statute of limitations.[7] ERISA's statute of limitations provision indicates that Congress recognized that employers may not always be readily identifiable or, indeed, may actively conceal their existence. Section 1451(f)(2) is the remedy for such a case, providing two extensions to the § 1451(f)(1) limitation. The first extends the period three years from the plan's acquiring "actual knowledge"; the second extends the period six years "in the case of fraud or concealment." 29 U.S.C. 1451(f)(2). On its face the provision applies to all MPPAA actions since it contains no limitations. Nonetheless the district court did not apply Section 1451(f)(2) because the court believed the "single employer" treatment accorded controlled group members rendered that section null (in a collection action but not other MPPAA actions). As illustrated at Argument I (supra),

---

[7] Obviously to the extent that the applicability of § 1451(f)(2) turns on the Fund's lack of "actual knowledge" or the employer's "fraud or concealment", the Fund has pleaded those facts sufficiently to overcome the motion to dismiss.

this extension of the "single employer" doctrine to Section 1451(f) would defeat both of its paragraphs where either a lawsuit (or claim in bankruptcy is timely filed against any one member. Further, closer analysis of § 1451(f) reveals that paragraph (f)(2) works hand in hand with paragraph (f)(1) in any collection action. Indeed even in the absence of § 1451(f)(2) similar principles of equity would apply.

Section 1451(f)(2) seems to codify the two equitable doctrines that are otherwise grafted on to statutes of limitations: equitable tolling and equitable estoppel. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990), *cert. denied*, —— U.S. ——, 110 S.Ct. 2916, 115 L.Ed. 2d 1079 (1991). Equitable tolling permits a plaintiff to avoid the statute of limitations if, despite due diligence, it is unable to obtain information bearing on the existence of the claim. *Id.* Equitable tolling therefore finds itself codified in the "actual knowledge" portion of § 1451(f)(2): the plaintiff knows of the injury, but is unable to obtain information to decide whether the injury is due to the wrongdoing, or any action, of an unknown defendant. Equitable estoppel, on the other hand, speaks to the "fraud or concealment" provision of 1451(f)(2) and arises where the plaintiff is prevented from suing in time by some effort on the part of the defendant. *Id.* ERISA's codification of these equitable defenses, which would otherwise apply to the statute of limitations, is thus an integral part of the statute of limitations and must apply to any collection action arising under the statute. 29 U.S.C. § 1451(b); (f)(1) and (f)(2).

Even if Section 1451(f)(2) does not apply to the Pension Fund's cause of action against these defendants, general equitable principles still do. *Central States, Southeast and Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1376; *Cada*, 920 F.2d at 451. The Pension Fund undertook affirmative steps to establish its

cause of action by filing its claim in bankruptcy, which tolled the statute of limitations. *See Central Transport,* 888 F.2d at 1164; *Banner Industries, Inc. v. Central States, Southeast and Southwest Areas Pension Fund,* 875 F.2d 1285, 1294 (7th Cir. 1989), *cert. denied,* 493 U.S. 1003, 110 S.Ct. 563, 107 L.Ed. 558 (1989).

Moreover, in November, 1983 and March, 1984, Central States solicited information, which would have led to these defendants, from the employer and received no response. This is thus a case where the employer concealed these defendants' identities, and it is equitably estopped under federal common law from asserting the Pension Funds' claim is barred by the statute of limitation. The Van Vorst Controlled Group was required by § 1399(a) to comply with the Pension Fund's request for information. 29 U.S.C. § 1399(a). The controlled group's failure to comply with this request prevented the Pension Fund from initiating a claim against these defendants and constituted "fraudulent concealment," or equitable estoppel. *Cada,* 920 F.2d at 451; *Martin v. Consultants and Administrators,* slip op. at 25-28 and note 17; *see also Rutledge v. Boston Woven Hose & Rubber Co.,* 576 F.2d 248, 250 (9th Cir. 1978) (silence is concealment where there is a duty to disclose).

The district court ought to have denied the defendants' motion to dismiss on the grounds that the Pension Fund had sufficiently pleaded both equitable tolling and equitable estoppel. Even better the district court should have recognized that the two equitable devices for avoiding the statute of limitations have already been made applicable to this case by their codification at § 1451(f)(2). It makes no sense to reject § 1451(f)(2) only to in essence rediscover it in equity since a straight-forward application of ERISA's statute of limitations reaches the same result. Since the Pension Fund filed its cause of action within 6 years after the date of discovery of its cause of action against these defendants, after uncovering the

employer's fraud or concealment, therefore, the Pension Fund's cause of action is not barred by the statute of limitations, and the order of the district court dismissing the complaint under Rule 12(b)(6) must be reversed.

* * * *

APPENDIX F

EXCERPT FROM THE REPLY BRIEF OF CENTRAL STATES PENSION FUND, *ET AL.*, IN THE COURT BELOW

PAGE 9

B. *The Statute of Limitations Has Been Tolled in this Case.*

Even if Central States' cause of action against the defendants arose in 1984, the Pension Fund demonstrates in its opening brief that its action was timely filed under 29 U.S.C. 1451(f)(2). That section provides that an action may not be brought after—

> 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action."

29 U.S.C. 1451(f)(2). The Pension Fund alleged in its complaint that it acquired actual knowledge of this cause of action in 1990. Whether Central States should have acquired this knowledge earlier, starting the three-year limitations period before 1990, is a factual inquiry which was inappropriately decided on a motion to dismiss. Defendants did not and do not offer any evidence or even allege that the Pension Fund should have acquired actual knowledge of these defendants and this cause of action earlier.

* * * *

(2)

Supreme Court, U.S.
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No. 93-974

In the
Supreme Court of the United States

October Term, 1993

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,

Petitioners,

vs.

NAVCO and WILLIAM L. CALDWELL, III,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the ruling below--which correctly holds that the Fund's suit is barred because its cause of action arose in 1984 when it knew of its injury and the cause of that injury, and which is consistent with the decisions of this Court and the Courts of Appeal--require review by this Court?

2. Should this Court review the decision below which correctly rejects the Fund's equitable tolling argument?[1]

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1 All parties to the proceeding below are listed in the caption of the case. Neither of the respondents is a corporation.

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No. 93-974

In the
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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,
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Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioners have not set forth a single ground for granting certiorari which merits serious consideration by this Court. The Court of Appeals correctly ruled that petitioners' cause of action arose in 1984, when the Fund knew of its injury and the cause of that injury--that is, "when the employers' debts to the pension plan

became over due." Pet. Appx., p. 5a. Even assuming that there had been some "concealment," as petitioners erroneously assert (Pet., pp. 15-19), the controlling statute (29 U.S.C. § 1451(f)(2)) provides a six-year limitations period in such circumstances. The Fund filed seven years after it discovered its cause of action. There is no need for review by this Court.

STATEMENT OF THE CASE

The relevant facts, which are summarized in the opinions of the district court and Court of Appeals, are as follows:

Petitioner Central States, Southeast and Southwest Areas Pension Fund and its Trustees (hereinafter collectively "the Fund") filed suit in May 1991 against respondents NAVCO, a California limited partnership, and William M. Caldwell, III (hereinafter collectively "Respondents"), as well as two other parties who were not parties to the appeal below. Pet. Appx., p. 14a. Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the ground that the cause of action alleged in the Fund's complaint is barred by the statute of limitations and therefore fails to state a claim upon which relief

may be granted. Pet. Appx., p. 13a. The district court granted Respondents' motion (Pet. Appx., p. 17a), and denied a subsequent motion to alter or amend the order granting Respondent's motion (Pet. Appx., p. 25a).

In its complaint, the Fund alleged that United States Bedding Company and The Englander Company (hereinafter collectively "the employers"), who are not parties to this action, were subject to collective bargaining agreements which require them to make contributions to the Fund on behalf of their employees. Pet. Appx., p. 13a. The Fund alleges that the employers withdrew from the Fund in January 1984 (by ceasing to have an obligation to contribute to the fund and by ceasing to make contributions to the Fund). See Pet. Appx., p. 3a. The Fund alleges that in April 1984 the Fund issued a demand for payment of withdrawal liability under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 ("ERISA"). Pet. Appx., p. 3a. The Fund alleges that the employers and Respondent NAVCO "were members of a group of trades or businesses under common control and are treated as a single employer for purposes of the assessment and collection of withdrawal liability" (Appx.

to Brief of Appellants (7 Cir.), p. 18), allegedly based on a provision of ERISA making affiliates jointly liable with the employer (29 U.S.C. § 1301(b)(1)).

In granting Respondents' motion to dismiss, the district court noted that under ERISA "[a]n action may be brought no later than three to six years after plaintiffs have discovered their cause of action or injury" (Pet. Appx., p. 15a), and that

> "Plaintiffs knew of their injury, nonpayment, and thus, this cause of action, when demand was made upon the Van Vorst Controlled Group and payment was not made by any Group members in June of 1984. See 29 U.S.C. § 1399(c)(2) (payment due within 60 days after demand). Plaintiffs should have filed this complaint by 1987, or, at the latest, by 1990."

Pet. Appx., p. 16a. The district court concluded:

> "When plaintiffs were aware that they had not been paid, they should have investigated and sued, within the statute of limitations period, those group members of which they were aware. Once the suit had been

instituted, discovery could have been conducted to determine the identities of the other members in time to join them within the limitations period."

Pet. Appx., pp. 16a-17a.

The Court of Appeals affirmed. On September 20, 1993, the Court of Appeals denied the Fund's petition for rehearing. Pet. Appx., p. 27a.

ARGUMENT

I. THE RULING BELOW--THAT THE FUND'S SUIT IS BARRED BECAUSE ITS CAUSE OF ACTION AROSE IN 1984 WHEN IT KNEW OF ITS INJURY AND THE CAUSE OF THAT INJURY--IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEAL.

The Court of Appeals correctly ruled that the Fund's cause of action arose in 1984, when the Fund knew of its injury and the cause of that injury--that is, "when the employers' debts to the pension plan became overdue." Pet. Appx., p. 5a. The Court of

Appeals rejected the notion that the Fund's cause of action arose when it "discovered the identity of persons who might be required to satisfy those debts" (Pet. Appx., p. 5a):

> "Section 1451(f)(2) [of Title 29] states a 'discovery' rule, and a claim accrues under a discovery rule when the victim knows of his injury. The time begins even though the victim does not know that the injury is actionable. E.g., United States v. Kubrick, 444 U.S. 111, 119-22 (1979). . . . If a claim accrues even though the victim does not know that he has a legal entitlement to recover, the fact that the victim does not know who would be the right defendant cannot matter."

Pet. Appx., p. 5a. The Court of Appeal thus concluded:

> "Thus the six years began in 1984 and expired before [the] pension plan filed suit. The potential difference between § 1451(f)(1) and (2) need not detain us, because [the] pension plan 'discovered' the nonpayment immediately. Even the proviso to § 1451(f)(2), awarding six years from discovery in

the event of fraud or concealment, would not add a day to the six years available under § 1451(f)(1)."

Pet. Appx., p. 9a.

The Court of Appeal's ruling is entirely consistent with this Court's decision in United States v. Kubrick, 444 U.S. 111 (1979). In Kubrick, this Court held that a claim accrues under the Federal Tort Claims Act when the plaintiff knows the existence and cause of its injury. 444 U.S. at 113, 119-122. Here, the Fund's cause of action arose in 1984, when the Fund knew of its injury (unpaid withdrawal liability) and the governing cause of that injury (withdrawal of the employers from the Fund).[2]

There is no authority in conflict with the decision below on this point. The Fund erroneously asserts that the decision below

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2 The Fund determined in January 1984 that the employers ceased contributing to the Fund and were no longer under an obligation to contribute. Appx. to Brief for Appellants (7 Cir.), p. 18. On or about April 6, 1984, the Fund demanded payment. Id. at 19. The Fund never received any payment, which was due in June 1984 (60 days after demand (29 U.S.C. § 1399(c)(2))). Id. at 19.

Thus, this is not a case like Northern California Retail Clerks Pension Fund v. Jumbo Markets, Inc., 906 F.2d 1371 (9th Cir. 1990), where the pension fund did not know of its injury. See Pet., p. 18.

is in conflict with various Court of Appeals decisions purportedly holding knowledge of identity of a defendant may be essential to accrual of a cause of action where the defendant has concealed his identity. Pet., pp. 12, 17-18. But here the Court of Appeals correctly concluded that "[Respondents] Navco and Caldwell did not attempt to deceive the pension funds or induce them to defer suing."[3] Pet. Appx., p. 11a. Moreover, even assuming that there had been some concealment, section 1451(f)(2) provides that "in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action." 29 U.S.C. § 1451(f)(2). As discussed above (supra, p. 4), the Fund discovered its cause of action in 1984, and failed to file suit within six years of its discovery.

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3 Thus, this is not a case like Barrett v. United States, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983), where the Government had "actively covered up both its involvement in the affair and the nature of its misdeeds," in a "deliberate concealment of material facts relating to the Government's wrongdoing." 689 F.2d at 327-328. And, in Diminnie v. United States, 728 F.2d 301 (6th Cir. 1984), cert. denied, 469 U.S. 842 (1984), the court refused to extend a limitations period, holding that "the plaintiff must show fraudulent concelament of the critical facts before accrual will be postponed." 728 F.2d at 305.

Similarly, the Fund's argument that the decision is in conflict with Joyce v. Clyde Sandoz Masonry, 871 F.2d 1119 (D.C. Cir. 1989), cert. denied, 493 U.S. 918 (1959), is wholly without merit. The passage from Joyce quoted by the Fund expressly addresses only section 1399(b)(1), which the Joyce court notes does not specify a precise time limit for plans to demand payment after an employer's withdrawal, and instead "require[s] only that plan sponsors act 'as soon as practicable after an employer's complete . . . withdrawal.' 29 U.S.C. § 1399(b)(1)." 871 F.2d at 1126. Indeed, the Fund omits the immediately following discussion in Joyce, that directly contrasts section 1399(b)(1) with the express limitation periods for filing suit set forth in section 1451(f), which are at issue here. 871 F.2d at 1126.[4] As the Court of Appeals noted, section 1451(f)(1) affords a generous six-year limitations period for the very purpose of allowing pension funds an opportunity to investigate and pursue claims. Pet. Appx. pp. 6a-7a. The Fund simply failed to do so here.

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4 The Fund's additional argument that the ruling below "made 29 U.S.C. § 1451(f)(2) superfluous" (Pet., p. 22) is addressed in detail in the district court's opinion. Pet. Appx., pp. 23a-24a.

II. THE COURT BELOW CORRECTLY REJECTS THE FUND'S EQUITABLE TOLLING ARGUMENT.

The Court of Appeals correctly rejected the Fund's argument that the limitations period in this case was subject to equitable tolling. Pet. Appx., pp. 11a-12a. The Fund failed even to plead facts showing its due diligence.

> "[B]ecause 'statutes of limitation are vital to the welfare of society and are favored in the law,' the plaintiff who invokes the doctrine of fraudulent concealment will be 'held to stringent rules of pleading and evidence, "and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made."'"

Pinney Dock and Transport Co. v. Penn Cent. Corp., 838 F.2d 1445, 1465 (6th Cir. 1988), cert. denied, 488 U.S. 880 (1988). The Fund alleges no such facts in its complaint.

Thus, even accepting the allegations in the Fund's complaint "as true" (Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984), the Fund's suit is barred. The Fund's authorities are not to the contrary. In Richards v. Mileski, 662 F.2d 65 (D.C. Cir. 1981), for example, the complaint stated allegations of "due diligence more than sufficient to invoke the tolling doctrine." 662 F.2d at 73. And, in Connors v. Hallmark, 935 F.2d 336 (D.C. Cir. 1991), there were ample facts in the record showing due diligence. Here, the Court of Appeals correctly rejected the Fund's eleventh-hour attempt to add new facts in its petition for rehearing. Pet. Appx., p. 27a. An appellant may not use a petition for rehearing as an opportunity to introduce an affidavit addressing a matter that was not even pled in its complaint. See Fed. R. App. P., Rule 40(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 93-974

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PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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PETITIONERS' REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. THE COURT BELOW IS IN CONFLICT WITH OHER CIRCUITS IN ITS INTERPRETATION OF *U.S. v. KUBRICK*, 444 U.S. 111 (1979).

Petitioner Central States, Southeast and Southwest Areas Pension Fund ("Central States") was injured when U.S. Bedding failed to pay its withdrawal liability, as required by 29 U.S.C. §§ 1381(a) and 1399(b); and since Central States knew that U.S. Bedding had not paid, a cause of action accrued against U.S. Bedding at that time pursuant to 29 U.S.C. § 1451(a). Respondents NAVCO and William Caldwell also failed to pay their withdrawal liabilities, so there was a cause of action against each of

them as well. The liability of each, however, is joint and several with U.S. Bedding; thus there were three causes of action to be discovered.[1] Since under the federal discovery rule a cause accrues for purposes of a statute of limitations when it is "discovered," there were potentially three separate statute of limitations periods depending on when each cause was discovered. *Dubose v. Kansas City S. Ry. Co.*, 729 F.2d 1026, 1031 (5th Cir. 1984); *Drazan v. United States*, 762 F.2d 56 (7th Cir. 1985).

In their response Respondents, NAVCO and William Caldwell, imply that there is only a single cause of action for withdrawal liability no matter how many businesses in this "controlled group" are liable under the statute. Thus, according to the assumption, the cause of action would have accrued against all of them at once when U.S. Bedding failed to pay its liability. (Accrual would be automatic since Central States, having sent a demand for payment, would know that it had not been paid.) Thus, according to the Respondents (and the Seventh Circuit), it is not necessary for Central States to know of their existence or their relationship to U.S. Bedding for the statute to run (although, they would agree, it certainly is necessary for Central States to identify, find, and sue them (individually) to collect the liability). Apparently on the basis of this implied assumption by Respondents, they conclude that there is no conflict between the court below and other circuits because their concealment of their identities would be irrelevant if the running of the limitations period is triggered by U.S. Bedding alone.

The Second, Fifth and Sixth Circuits have held that where the identity of a defendant is concealed from the plaintiff, the cause of action may not accrue until the de-

[1] A cause of action actually arose against each trade or business under common control with U.S. Bedding, pursuant to 29 U.S.C. § 1301(b)(1), of which there are more than three; but three is enough to serve this argument.

fendant's identity is discovered.[2] The court below, by contrast, while noting that Defendants' identities were concealed from Ceneral States,[3] held that the concealment did not delay accrual of the causes of action against them. The Seventh Circuit believed, on policy grounds, that pension plans should be encouraged to sue more promptly by imposing a single statute of limitations to run concurrently against these companies as if they were one.[4] Whether right or not, the Seventh Circuit split from the Second, Fifth and Sixth Circuits in interpreting *U.S. v. Kubrick*, 444 U.S. 111 (1979), and no amount of gloss by Respondents can hide the departure.[5]

This Court should resolve the conflict because the statute (ERISA) requires consistent application to achieve Congress' desire for nationwide uniformity in pension law. In addition, unequal treatment of plans on a cir-

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[2] *Barrett v. United States*, 689 F.2d 324 (2nd Cir. 1982); *Harrison v. United States*, 708 F.2d 1023 (5th Cir. 1983); *Diminnie v. United States*, 728 F.2d 301 (6th Cir. 1984).

[3] The court acknowledged that "silence [is] a mild form of concealment." Petition Appendix at 11a. Other courts of appeals have seen nothing "mild" about it. *IUE Pension Fund v. Barker & Williamson*, 788 F.2d 118, 128 (3rd Cir. 1986). Failure to disclose where there is a duty to disclose is not to be disregarded. *Northern California Retail Clerks Pension Fund v. Jumbo Markets*, 906 F.2d 1371 (9th Cir. 1990).

[4] The policy judgment is belied by 29 U.S.C. § 1451(f)(2), which demonstrates no congressional solicitude for fraud or concealment under the statute of limitations.

[5] For example, Respondents state without explanation that "this [case] is not like *Barrett*." Brief at 8, n.3. But in *Barrett*, 689 F.2d at 330, the Second Circuit remanded the case for a factual determination of whether the defendant was concealed and whether plaintiffs should have discovered the cause of action. In this case the Seventh Circuit deprived Central States of an opportunity to develop such a record. Likewise, because the district court ruled on a motion to dismiss, Central States had no opportunity to show the critical facts as required under *Diminnie*, 728 F.2d at 305. Rather than confront these cases, Respondents simply dimiss them.

cuit by circuit basis breeds litigation and forum shopping and leads to unwarranted increases in pension plan administrative costs, which are born by participants through lower benefits. Moreover, *Kubrick* is not a pension case and its principles span the gamut of federal civil litigation. A uniform federal rule on accrual of a cause of action is essential for orderly federal litigation.

II. RESPONDENTS FAIL TO ADDRESS QUESTION 2, THE ABSOLUTE ABSENCE OF RECORD SUPPORT FOR THE DECISION BELOW.

Respondents assert that Central States failed to plead facts showing due diligence and thus was not entitled to equitable tolling of the statute of limitations. Neither the district court nor the court of appeals made any such ruling or even addressed that question. The district court (Judge Grady) never examined the complaint for due diligence, nor considered equitable tolling, because the question was irrelevant to the legal ruling the district court made in dismissing the complaint.[6]

The court below might have caught this error and have remanded the case, but it made its own, separate error. It confused the two cases it had consolidated before it: one decided on summary judgment and the other (this one) on motion to dismiss. In the companion case the district court (Judge Plunkett) gave the plaintiff pension plan an opportunity to show diligence. When that plaintiff did not respond, the court granted summary judgment to the defendants. In this case, by contrast, the district

[6] The district court erroneously believed that the statute required that these companies be treatel literally as one employer so that knowledge of one constituted knowledge of all. The court of appeals did not address this point and ruled on other grounds. That the district court was wrong is demonstrated by the fact that a judgment against one controlled group member is not a basis to institute garnishment or other collection proceedings against the others. Indeed "joint and several" liability implies a separate cause of action against each.

court (Judge Grady), saw no need for a diligence determination and dismissed the case on other grounds. The Seventh Circuit, in effect, deferred to Judge Plunkett's ruling in affirming Judge Grady in the instant case.

On petition for rehearing the court below attempted to recover from this error by stating that Central States waived its equitable tolling argument by failing to present it on appeal. This is obviously incorrect (Petition at 9 and Appendix at 28a-32a) and is (properly) not defended by Respondents. Instead Respondents suggest that there were not ample facts in the record to support a due diligence argument. But of course there were no facts in the "record." [7] The district court did not permit development of a record, which is the whole point of Petitioners' Question 2. Respondents have simply not responded to Question 2.

Had the court below remanded this case for a determination of whether Central States was entitled to equitable tolling, it could have avoided the conflict it created between itself and the Second, Fifth and Sixth Circuits. By its error the court has unnecessarily placed not only pension plans like Central States, but all federal litigants in positions of uncertainty as to when a cause of action accrues under *Kubrick*. If Central States were not diligent, it might lose under either *Kubrick* or equitable tolling; but the court below should not have attempted to answer that question itself and especially without a record. Remand of this case now would remove the conflict and would allow the Seventh Circuit to consider *Kubrick* (the next time it may be presented) in a more appropriate case—one with a record.

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[7] Central States submitted an affidavit regarding the facts it would have shown had it been permitted to do so. The purpose of submitting the affidavit on petition for rehearing was not to make a record but only to show the court the kind of record a remand might produce.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari this Court should grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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